

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)



**U.S. Citizenship
and Immigration
Services**

DATE: **FEB 25 2013**

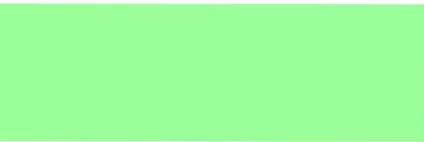
OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner:
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

A handwritten signature in black ink, appearing to read "RON ROSENBERG".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center (Director). It is now on appeal before the Acting Chief, Administrative Appeals Office (AAO). The Director's decision will be withdrawn, and the petition remanded to the Director for a new decision.

The petitioner is a hearing healthcare clinic. It seeks to permanently employ the beneficiary in the United States as an audiologist pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, the petition is accompanied by an Application for Permanent Employment Certification, ETA Form 9089, certified by the U.S. Department of Labor (DOL).

On November 17, 2010, the Director denied the petition on the ground that the petitioner did not establish its ability to pay the proffered wage. The Director based his determination on the petitioner's 2008 federal income tax return, Form 1120, which recorded a net loss for the year of more than \$3 million and net current liabilities of more than \$2 million.

The petitioner filed a timely appeal on December 15, 2010, along with supporting documentation. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The petitioner must establish its continuing ability to pay the proffered wage to the beneficiary from the priority date up to the present. *See* 8 C.F.R. § 204.5(g)(2). The proffered wage, as indicated in the labor certification, is \$28.52 per hour, which amounts to \$59,321.60 per year based on a work year of 2,080 hours. The priority date of the instant petition is October 20, 2009, which is the date the underlying labor certification was accepted for processing by the DOL.¹ *See* 8 C.F.R. § 204.5(d).

The new evidence submitted on appeal includes a copy of the Wage and Tax Statement, Form W-2, issued to the beneficiary for 2009,² which shows that her compensation from the petitioner totaled \$48,338.61 that year. Another item submitted on appeal is an earnings statement issued to the beneficiary on December 3, 2010, which shows that her gross pay up to that point in 2010 was \$64,358.52. Thus, the beneficiary's pay from the petitioner exceeded the proffered wage in 2010, but was nearly \$11,000 below it in 2009. However, the record also includes a copy of the petitioner's "Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934" for the fiscal year ending on December 26, 2009, which shows that the petitioner's net income was \$1,514,000 in 2009. Based on this information in the annual report the AAO is satisfied that the petitioner more likely than not had the ability to pay the full proffered wage in 2009 as well. Upon review of the entire record, the AAO determines that the petitioner has established its continuing ability to pay the proffered wage from the priority date onward. Accordingly, the AAO will withdraw the Director's denial decision that was based on the petitioner's failure to establish its ability to pay the proffered wage.

¹ Following the DOL's certification of the ETA Form 9089 on April 1, 2010, the Immigrant Petition for Alien Worker (Form I-140) was filed on June 11, 2010.

² The beneficiary was evidently employed by the petitioner for the entire year 2009, since the labor certification states that she began working for the petitioner in February 2008.

However, the AAO cannot approve the petition because it has not been established that the beneficiary has the requisite educational degree (1) to be eligible for classification as an advanced degree professional under section 203(b)(2) of the Act, and (2) to qualify for the proffered position under the terms of the labor certification, ETA Form 9089.

Section 203(b)(2) of the Act provides for the granting of preference classification to members of the professions holding advanced degrees whose services are sought by employers in the United States. The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as follows:

Advanced degree means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). On the ETA Form 9089 the petitioner specified the following educational, training, and experience requirements for the audiologist position:

- The minimum educational requirement is a master's degree or a foreign educational equivalent in audiology and speech rehabilitation, or speech and language pathology, or audiology. (Part H, line 4, 4-B, 7, 7-A, and 9.)
- No training or experience in the job offered is required. (Part H, lines 5 and 6.)
- No alternate combination of education and experience is acceptable. (Part H, line 8.)
- A New York State audiology license is required. (Part H, box 14.)

While the beneficiary has the requisite license from the State of New York, it has not been established that she has the requisite master's degree or foreign equivalent degree. The record shows that the beneficiary was awarded a [REDACTED]

[REDACTED] on July 16, 2004, following the completion of a five-year course of study from 1997 to 2002 and a final research paper on November 21, 2003.

The petitioner has submitted an academic equivalency evaluation from The Trustforte Corporation (Trustforte) in New York City, according to which the beneficiary's education at [REDACTED] is equivalent to a master of science degree in speech and language pathology and audiology from an accredited U.S. university. The Trustforte evaluation has little substantive analysis, however, to back its conclusion of degree equivalency. According to Trustforte, the phonoaudiology program at [REDACTED] "consists of bachelor's and graduate-level studies leading to the completion of a master's-level degree." The beneficiary's transcript does contain two "graduation" entries. They

³ Substantive translation: Professional license degree in Phonoaudiology.

indicate that on July 31, 2000 she graduated with a degree in phonoaudiology, conferred on June 12, 2001,⁴ and that on November 21, 2003 she graduated with her [REDACTED] (professional license degree in phonoaudiology), conferred on July 16, 2004. Neither Trustforte nor the transcript itself explains the significance of the initial degree. It does not appear that it would have entitled the beneficiary to practice phonoaudiology in [REDACTED] since the second degree was her professional license degree. In short, there is little support in the record for Trustforte's claim that the beneficiary's degrees from [REDACTED] are equivalent to a bachelor's degree and a master's degree, respectively, from a U.S. university.

As another resource to consider the beneficiary's educational credentials, the AAO has consulted the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries." <http://www.aacrao.org/About-AACRAO.aspx>. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the evaluation of foreign educational credentials." <http://edge.aacrao.org/info.php>. Authors for EDGE are not merely expressing their personal opinions. Rather, they must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.⁵ If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.⁶

In the section related to [REDACTED] educational system, EDGE states that a [REDACTED] is usually a five-year first degree program that represents a level of education comparable to a bachelor's degree in the United States. EDGE also has an entry for [REDACTED] – which it describes

⁴ There is no copy of this diploma in the record.

⁵ See *An Author's Guide to Creating AACRAO International Publications* available at http://www.aacrao.org/publications/guide_to_creating_international_publications.pdf.

⁶ In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

[REDACTED] graduate program of one to two years that represents a level of education comparable to one to two years of graduate study in the United States. The beneficiary's final degree is not identified as a [REDACTED] on either her diploma or her transcript. To the contrary, both documents identify the degree as a straightforward [REDACTED] – a professional license degree in phonoaudiology. According to EDGE this degree is comparable to a U.S. bachelor's degree in the field, not a U.S. master's degree.

Since the Director did not address the beneficiary's educational credentials in his decision, the AAO will remand this case for further consideration of this issue. The Director may request additional evidence from the petitioner, if needed, and the petitioner may submit additional evidence within a reasonable period of time to be set by the Director. The Director will then issue a new decision.

As always in visa petition proceedings, the burden of proof rests solely with the petitioner. See Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The Director's decision of November 17, 2010, is withdrawn. The petition is remanded to the Director for consideration of the petitioner's educational credentials – in particular, whether they make her eligible for classification as an advanced degree professional under section 203(b)(2) of the Act and whether they qualify her for the proffered position under the terms of the labor certification. The Director may request additional evidence from the petitioner, and prescribe a time period for its submission. A new decision will then be issued by the Director.